STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2008AP2396-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL B. HOERIG,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING SENTENCE MODIFICATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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QUESTION PRESENTED

Did the circuit court properly exercise discretion when the court denied defendant-appellant Michael B. Hoerig's sentence-modification motion?

- By its decision, the circuit court implicitly answered "Yes."
- This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

On August 28, 2001, Hoerig pled guilty in Milwaukee County Circuit Court to one count of violating Wis. Stat. § 948.02(2) (2001-2002 ed.)[1] by committing second-degree sexual assault of a child, a Class BC felony (13:1, R-Ap. 102; *see also* 6, R-Ap. 116-17 (plea questionnaire); R-Ap. 104-05 (WCCA court record events)).

On November 27, 2001, the Milwaukee County Circuit Court held the sentencing hearing (38, R-Ap. 229-304). Defense counsel told the court that "in regard to the presentence, Mr. Hoerig related that it's substantially true and correct" (38:21, R-Ap. 249). Neither defense counsel nor Hoerig proposed any changes to the PSI.

The court sentenced Hoerig to a term of eleven years' imprisonment: three years of initial confinement and eight years of extended supervision (13:1, R-Ap. 102; *see also* 38:69, R-Ap. 297 (sen-

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2007-2008 edition.

tencing hearing)). The court also imposed strict no-contact provisions:

> . . . No contact with females under the age of eighteen, unless supervised by the parents or guardian at all times.
>
> . . . .
>
> You are to have no contact with any child at all, because you're so inappropriate with children. . . . I want any child you have contact with to be made known to the agent by name and birth date.
>
> . . . .
>
> . . . You're to have no contact with this child under any circumstances. You're not to have contact with this child's parents or siblings, or anyone you know to be within the circle of friends or acquaintances of this family.
>
> No contact means no contact between you and these people, not phone calls, no calls through a third person, no letters, do you understand that Mr. Hoerig?
>
> THE DEFENDANT: Yes.
>
> THE COURT: If you violate any of those conditions or the ones the Department of Corrections set for you, you will serve the time remaining on your sentence, because you're going to be revoked. Eleven years less any time served in custody.

(38:73-74, R-Ap. 301-02.) *See also* 6:2, R-Ap. 117 ("no contact with victim" as component of plea agreement); 13:1, R-Ap. 102. The court described Hoerig as "very lucky":

> I'm being easy on you today, because I have respect for your attorneys. I didn't exceed the [joint] recommendation.
>
> But this is one time in my life I would have wanted to see this doubled. You're very lucky.

(38:74, R-Ap. 302.)

Hoerig did not pursue a direct appeal from the judgment of conviction.

On September 7, 2004, the Department of corrections (DOC) released Hoerig to extended supervision (19, R-Ap. 118; 31:18, R-Ap. 166).

Between December 20, 2004, and December 20, 2006, Hoerig committed numerous violations of the circuit court's no-contact order and of conditions of extended supervision (19, R-Ap. 118; *see also* 31:38, R-Ap. 221 (notice of violation)).

On January 19, 2005, the victim contacted Hoerig's extended-supervision agent. "She wanted to know if she could have the no-contact order lifted. Th[e] agent explained to her that she would have to petition the Court for this, because the 'no-contact' was ordered by the Court" (31:32, R-Ap. 215). Around the same time, the victim learned from the court that "an attorney would have to file a petition" (31:27, R-Ap. 210).[2]

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[2] *See* Wis. Stat. § 302.113(7m) (petition procedure for modifying a court-ordered condition of extended supervision). Under section 302.113(7m)(e), Hoerig could not petition until a year after his release to extended supervision.

Around April 2005, Hoerig and the victim began living together and resumed their sexual relationship (31:27, 31, R-Ap. 210, 214).

On April 21, 2006, Hoerig and the victim married in Waukegan, Illinois (31:27, 28, 31, R-Ap. 210, 211, 214).

On September 28, 2006, during a scheduled visit with his extended-supervision agent, Hoerig denied he had married the victim "and said that he has not had any contact with [her]" (31:30, R-Ap. 213).

On December 20, 2006, in a meeting with his agent, Hoerig again denied the marriage (31:31, R-Ap. 214). He also "stated that he had 'embraced' and 'kissed' her sometime after Christmas of 2004. He went on to say that 'this (was) the only time I have ever had any contact with [the victim] or anyone in her family'" (31:31, R-Ap. 214).

On January 19, 2007, Hoerig filed a motion to modify the court's no-contact order (R-Ap. 107).

On March 1, 2007, the circuit court held a hearing on Hoerig's motion (32, R-Ap. 183 (circuit court decision and order referring to the hearing); 31:4, R-Ap. 187 (sentence-modification motion referring to "a return to court on 3/1/07" for permission to have contact with victim); R-Ap. 108 (WCCA court record showing hearing on March 1, 2007)). The court modified the order to provide for "[n]o contact with the victim UNLESS specifically author-

ized by the supervising agent" (R-Ap. 108 (emphasis in original)).[3]

On March 15, 2007, the Division of Hearings and Appeals (DHA) held an extended-supervision revocation hearing (33, R-Ap. 101 (circuit court decision noting date of revocation hearing)).[4]

On March 16, 2007, DHA determined that Hoerig had violated conditions governing his extended supervision (19, R-Ap. 118 (revocation order noting date of DHA determination)).

On April 4, 2007, DHA issued a revocation order and warrant (19, R-Ap. 118). DHA recommended reconfinement for two years, four months, and twenty-six days (19, R-Ap. 118).

On May 14, 2007, the circuit court held a reconfinement hearing (41, R-Ap. 305-12). At the hearing, the prosecutor recommended reconfinement for four years:

> I'm recommending he be reincarcerated for a period of four years. I can't find anything particularly good to say about Mr. Hoerig. He sexual assaults a 14-year-old girl, does three years in prison.

---

[3] By this time, Hoerig had already married the victim without prior notice to or permission of the court or Hoerig's agent (31:27, R-Ap. 210; 31:38, R-Ap. 221) and had lied to his agent about the marriage (31:30, 31, R-Ap. 213, 214).

[4] Hoerig has not provided in this appeal either a transcript of the revocation hearing or a copy of DHA's decision.

> He's ordered to have no contact with this girl. He gets out, he starts living with her, he marries her and he lies to his parole agent. It is just essentially spitting in the face of the rules of the Court and his parole officer – his supervising agent.
>
> If I had to guess, regardless of what you do here unless you gave him the full eight years, when he gets out, they'll be back together and will probably be back here again, so I think it has to be a significant penalty and I'm recommending four years.

(41:2-3, R-Ap. 306-07.) Hoerig's counsel "ask[ed] for the five months that [Hoerig] spent at [the Milwaukee Secure Detention Facility] to be a time-served-type disposition. In the alternative we're asking for a year, Judge, of reconfinement" (41:3, R-Ap. 307). In his allocution, Hoerig begged "for six months, eight months, something less than a year so that I can do what I need to do to put my life back together" (41:5, R-Ap. 309).

The court recognized the seriousness of Hoerig's crime and Hoerig's repeated disregard of the extended-supervision conditions:

> Well, it would appear that Judge Schellinger, who was the sentencing judge, certainly took into consideration those factors the Court must take into consideration when it sentenced you in the first place, and the Court's had the opportunity to read that transcript.
>
> It appears that the nature and the severity of that offense was certainly egregious because of the age of that child who was apparently 14 years old at the time. Your conduct and behavior while on extended supervision was poor, violating the rules of your community supervision soon after your release from prison, and there were a number of violations that you had contact with the victim of the offense,

> that you resided with that victim, that you had sexual relations with that victim without knowledge of the agent – the agent's awareness.
>
> You got married, had just numerous contacts. It went to a hearing examiner, and the hearing examiner found that the violations were substantiated. There were numerous violations, and the Court said that – that the reasons why you were revoked.
>
> Your adjustment under supervision was poor, according to the report the Court has before it. He has some sporadic employment history. An analysis was done.
>
> It was found that confinement in a structural correctional setting is necessary in order to protect the community from any further criminal behavior. It says that you continued to victimize the victim.
>
> Alternatives were considered and were rejected due to the fact that it would unduly depreciate the seriousness of the offense. That does basically fly in the face of any orders by the department, and I don't believe it shows an understanding by yourself of the gravity of this entire matter.

(41:5-7, R-Ap. 309-11.) The court reconfined Hoerig for three years, four months, and twenty-six days (20, R-Ap. 119; *see also* 41:7, R-Ap. 311).

On February 20, 2008 (more than nine months after the reconfinement hearing), Hoerig filed in the Milwaukee County Circuit Court a motion for sentence modification (26, R-Ap. 120-45). In the motion, Hoerig alleged that the DOC memorandum prepared for the reconfinement hearing con-

tained inaccurate information (26:2, R-Ap. 121).[5] Hoerig asserted that the victim initiated contact with him during his extended supervision (26:2-3, R-Ap. 121-22). He denied unsupervised contact with minors (26:3, R-Ap. 122). He complained about a reference in the court memo to a polygraph exam, while simultaneously acknowledging that he "deliberately deceived the polygraph examiner on these questions in order to protect his wife and their marriage" (26:4, R-Ap. 123). He complained "that had the rules of supervision been amended in 2005, when the request to lift the order of no-contact was originally brought before [his agent], there would have been no violations and the defendant would not now be incarcerated" (26:4, R-Ap. 123). He complained about the agent's ***Plotkin*** analysis[6] (26:5-9, R-Ap. 124-28). He complained about the DOC's "'special' rules violations for sex offenders" (26:10-11, R-Ap. 129-20). He sought sentence modification based on new factors (26:11, ¶ 14a, R-Ap. 130). He buttressed his request by asserting that his agent's "irrational claims and many illogical conclusions do not represent reality. They are the products of deception, manipulation and an inherent dishonesty" (26:11, R-Ap. 130). He contended that

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[5] For the DOC court memo, see 26:18-24, R-Ap. 137-43; 30:18-24, R-Ap.166-72; 31:29-35, R-Ap. 212-18. *See* ***State v. Walker***, 2008 WI 34, ¶ 19 n.8, 308 Wis. 2d 666, 747 N.W.2d 673 (describing characteristics and use of a DOC court memo).

[6] ***State ex rel. Plotkin v. Dep't of Health & Soc. Servs.***, 63 Wis. 2d 535, 217 N.W.2d 641 (1974).

> the premise that rules [of supervision], simply by virtue of having been created, carry with them the weight of moral rightness and, therefore, are to be accepted without question should also be rejected. In the defendant's case, his rules of supervision could have easily been modified to allow for the contact, which culminated in marriage for Mr. and Mrs. Hoerig, without compromising the integrity of the defendant's supervision or endangering the community in any way. Mrs. Hoerig's expressed desire to be with Mr. Hoerig was reasonable and legitimate and it should have been respected. She has made it clear that she is **not** a victim in her marriage.

(26:11-12, R-Ap. 130-31 (emphasis in original).) He alleged that his agent's "complete failure . . . to adequately and truthfully satisfy the Plotkin criteria in this case places the very validity of the defendant's revocation in question" (26:12, R-Ap. 131). He acknowledged his violations of the rules of supervision (26:12, R-Ap. 131), but asserted that the court should "modify his sentence to a period of not more than 18 months" (26:12, R-Ap. 131).

On February 22, 2008, the circuit court denied Hoerig's motion (27, R-Ap. 146). Noting that Hoerig's direct-appeal rights had expired long ago, the court construed the motion as one filed under Wis. Stat. § 974.06 (27, R-Ap. 146). The court succinctly explained the reason for denying the motion:

> The defendant's motion challenges the accuracy of the court memo prepared by his supervising agent for the reconfinement hearing. Nothing in the motion establishes that the information contained in the agent's memo was in fact inaccurate. Moreover, the defendant has not provided the court with a transcript of the reconfinement hearing to support his contention that the court relied upon the "inac-

> curate" information. It is the defendant's burden to support his motion with sufficient evidence from the record. Under the circumstances, the court cannot intelligently evaluate his current claims.

(26, R-Ap. 146.)

Hoerig did not appeal the circuit court's decision.

On August 8, 2008, Hoerig filed a motion to lift the no-contact restriction between him and the victim (30, R-Ap. 149-82). He characterized the restriction as one imposed by DOC (30:10-11, R-Ap. 158-59). He did not refer to the no-contact restriction imposed by the original sentence.[7]

On August 14, 2008, the circuit court denied Hoerig's motion to lift the no-contact restriction (32, R-Ap. 183). The court wrote that it had "reviewed the motion and denies it for the same reasons set forth by the court at the motion hearing held on March 1, 2007" (32, R-Ap. 183).[8]

Hoerig did not appeal from the court's order denying his motion to lift the no-contact restriction.

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[7] Here and elsewhere, Hoerig cites an unpublished opinion of this court: ***State v. Mizzles***, 168 Wis. 2d 359, 485 N.W.2d 839 (Ct. App. 1992) (table). *See* 30:2, R-Ap. 150. Hoerig's citations of ***Mizzles*** violate Wisconsin's noncitation rule. Wis. Stat. § (Rule) 809.23(3).

[8] The appellate record does not contain a transcript of the hearing held on March 1, 2007.

On August 18, 2008, Hoerig filed a second sentence-modification motion (31, R-Ap. 184-226). The second motion essentially repeated the first motion but added an argument about alleged errors in the reconfinement hearing (31:12, R-Ap. 195) and more explicitly identified the "new factors" on which he based his motion:

> 3. The court memo, prepared for the reincarceration hearing by PO Lisa Ruh and dated 1/12/07, contains inaccurate information, which the court relied on when imposing the defendant's sentence of revocation on 5/14/07, and which frustrated the purpose of that sentence. (State of Wisconsin vs. Norton, 2001 WI App. 245, 248 Wis. 2d 162, 635 N. W. 2d 656, 00-3538)
>
> 4. Highly relevant facts which were not considered at the time of sentencing also worked to frustrate the purpose of the sentence. (State of Wisconsin vs. Johnson, 210 Wis. 2d 196, 565 N. W. 2d 191 (Ct. App. 1997) 96-1532)
>
> 5. Together, these constitute new factors which entitle the defendant to make direct appeal to the court to modify his sentence of revocation. (State of Wisconsin vs. Scaccio, 240 Wis. 2d 95, 622 N. W. 2d 449 (App. 2000) 99-3101)

(31:2, R-Ap. 185.)

On August 20, 2008, the circuit court denied Hoerig's motion (33, R-Ap. 101). The court noted that Hoerig "could have challenged the contents of the [DOC] memo at the revocation hearing or in an action for certiorari review. No certiorari action was filed in connection with the revocation determination, and therefore, the defendant waived his opportunity to challenge the accuracy of the agent's memo" (33, R-Ap. 101). The court also

noted that Hoerig's claim did not fit within the purview of section 974.06 (33, R-Ap. 101).

On September 25, 2008, Hoerig filed in the Milwaukee County Circuit Court a notice of appeal from the circuit court's decision denying his second sentence-modification motion (36:1).

If the State's argument requires additional facts, the State will present those facts in the "Argument" portion of its brief.

STANDARD OF REVIEW

An appellate court reviews for an erroneous exercise of discretion a circuit court's decision to grant or deny a motion for sentence modification. ***State v. Noll***, 2002 WI App 273, ¶ 4, 258 Wis. 2d 573, 653 N.W.2d 895. A circuit court properly exercises its discretion if it relies on the facts in the record and uses the correct legal standard and a rational process to reach a conclusion that a reasonable judge could reach. ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999).

ARGUMENT

I. THE EXPANSIVENESS OF HOERIG'S AMENDED APPELLATE BRIEF REQUIRES CAREFUL IDENTIFICATION OF THE ISSUES APPROPRIATE FOR REVIEW IN THIS APPEAL.

The array of claims Hoerig has apparently asserted in his amended appellate brief risks obscuring a critical point. This appeal concerns one — and only one — order of the circuit court: the order

denying Hoerig's second sentence-modification motion (36:1). Hoerig did not pursue a direct appeal from his judgment of conviction and did not appeal from either the circuit court's order denying his first sentence-modification motion (27, R-Ap. 146) or the circuit court's order denying his motion to lift the no-contact order (32, R-Ap. 183). Consequently, regardless of how many issues Hoerig purports to raise on appeal, the claims asserted in the second sentence-modification motion define the claims of error subject to review in this appeal.

In the conclusion to his motion, Hoerig summarized seven errors he regarded as justifying sentence modification (31:13-14, ¶¶ 25-31, R-Ap. 196-97). On appeal from the order denying his second sentence-modification motion (33, R-Ap. 101), Hoerig advances (by the State's count) twelve contentions he believes merit overturning the circuit court's decision:

1. "The court has the inherent authority to modify the sentence it imposed based on the merits of new factors **at any time** as a **discretionary review**. (State of Wisconsin vs. Noll, 2002 WI App. 273; 258 Wis. 2d 573, 653 N. W. 2d 895, 2002 Wisc. App. LEXIS 1143) Furthermore, the court has the authority to modify all conditions of extended supervision established for a specific probationer, including those imposed by the DOC. (§973.09 (3)(a)) (DCC Operations Manual, 06.14.04) (State of Wisconsin ex rel. Taylor vs. Linse, 161 Wis. 2d 719, 469 N. W. 2d 201, 1991 Wisc. App. LEXIS 287)."

Hoerig's Amended Brief at 9 (emphases in original).

2. Two new factors justified "direct appeal to the [circuit] court to modify the sentence." *Id.* at 10. First, a court memo prepared by his supervising agent "contained inaccurate and misleading information, which the court relied on when sentencing Mr. Hoerig, and which served to frustrate the purpose of that sentence." *Id.* at 9. Second, "[h]ighly relevant facts not considered at the time of sentencing also worked to frustrate the purpose of the sentence." *Id.* at 9-10.

3. The circuit court erred when it held that Wis. Stat. § 974.06 barred consideration of his sentence-modification motion. Hoerig's Amended Brief at 10-11.

4. Hoerig did not receive a copy of his agent's court memo of January 12, 2007, until the day of the reconfinement hearing. *Id.* at 11. This delay precluded him from challenging the contents of the memo and denied him due process. *Id.* at 11-12.

5. The marriage of Hoerig to his victim "gave them specific rights and liberties protected by the U. S. Constitution, among them a liberty interest of free association and a right to privacy relative to their marriage relationship." *Id.* at 12. "The court and the DOC restricted Mr. & Mrs. Hoerig's liberty interests without due process for Mrs. Hoerig, who had committed no crime and was not subject to the jurisdiction of the DOC,

and without demonstrating compelling reasons for doing so in Mr. Hoerig's case." *Id.*

6. For an array of reason, the no-contact restriction does not serve any legitimate purpose. *Id.* at 12-18. *See also id.* at 25 (describing the no-contact restriction as "an unreasonable, inappropriate, and overly broad order and, therefore, in violation of state statutes and departmental regulations").

7. His agent did not seriously consider alternatives to revocation, as required by ***State ex rel. Plotkin v. Dep't of Health & Soc. Servs.***, 63 Wis. 2d 535, 217 N.W.2d 641 (1974). Hoerig's Amended Brief at 18-21.

8. His agent's memo should not have contained any reference to a polygraph examination given to him. *Id.* at 21-22.

9. DOC should not have recommended an enhanced penalty based on his original sexual-assault crime. *Id.* at 22.

10. "The DA's flippant comment that he could think of **nothing** good to say about Mr. Hoerig was reckless, inflammatory, and a poor justification for requesting a sentence nearly double the one recommended by DOC, one which was in reality already double the 15% penalty appropriate to Mr. Hoerig's violations." *Id.* at 22 (emphasis in original). The prosecutor "failed to take into account considerable evidence to the contrary: mitigating factors that would have

assisted the court in establishing a fairer sentence for Mr. Hoerig. As a result, the court was influenced to impose an overly harsh sentence on him, one clearly disproportionate to his offense, which consisted only of non-criminal rule violations." *Id.* at 23.

11. The circuit court erroneously applied the primary sentencing factors when the court decided on the reconfinement period. *Id.* at 23-24.

12. The circuit court misunderstood DOC's sentencing recommendation, resulting in "a sentence that was unduly harsh relative to the non-criminal rule violations which constituted the case against him." *Id.* at 24.

As one remedy, Hoerig asks this court "to forbid the DOC from imposing restrictions of any sort on his constitutionally protected marriage rights, including restrictions on prison visitation or correspondence by mail or phone." *Id.* at 28. For a second remedy, Hoerig asks this court "to modify his unduly harsh sentence and **release him immediately** to extended supervision." *Id.* at 29 (emphasis in original).

II. ALTHOUGH THE CIRCUIT COURT ERRED BY HOLDING THE SENTENCE-MODIFICATION MOTION TIME-BARRED, THE ERROR DID NOT HARM HOERIG AND DOES NOT BAR REVIEW BY THIS COURT.

The State agrees with Hoerig on one point: the circuit court erred when the court treated the motion as time-barred. In the motion, Hoerig identified the existence of "new factors" as one of the bases for sentence modification (31:13, ¶ 25, R-Ap. 196). A sentence-modification request based on a new factor invokes the circuit court's inherent power. ***Noll***, 258 Wis. 2d 573, ¶ 11. "The court exercises its inherent power to modify a sentence only if a defendant demonstrates the existence of a 'new factor' justifying sentence modification." ***Id.***

> This inherent authority may be exercised as a matter of discretion and is not governed by a time limitation. The circuit court, therefore, should not have dismissed [defendant]'s motion as untimely under WIS. STAT. § 973.19. Instead, the court should have analyzed the merits of the specific claims made in [defendant]'s motion for sentence modification . . . .

Id. ¶ 12 (citation omitted).

Here, the circuit court should not have disregarded Hoerig's "new factor" claim. Instead, as required by ***Noll***, the court "should have analyzed the merits of the specific claim[ ]" and decided whether new factors existed and, if so, whether the court, in its discretion, regarded the new factors as meriting modification of the reconfinement decision.

The circuit court's error, however, did not cause Hoerig any cognizable harm. As discussed below, Hoerig's motion did not identify anything that qualifies as a "new factor."

III. HOERIG'S MOTION DID NOT IDENTIFY ANYTHING QUALIFYING AS A "NEW FACTOR."

A. Summary Of "New Factor" Law.

> To have his sentence modified, [a defendant] must overcome two hurdles. First, [the defendant] must demonstrate that a new factor exists. If so, [the defendant] next must demonstrate that the new factor warrants sentence modification. Whether a fact or set of facts constitutes a new factor is a question of law this court decides without deference to the circuit court's determination. Whether the new factor warrants sentence modification, however, is a matter we entrust to the circuit court's discretion.
>
> A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties. The effect of the "new factor" must frustrate the purpose of the original sentencing.
>
> The existence of a new factor must be shown by clear and convincing evidence. . . .

State v. Delaney, 2006 WI App 37, ¶¶ 7-9, 289 Wis. 2d 714, 712 N.W.2d 368 (citations omitted).

> Thus, sentence modification on the basis of a new factor is a two-step process. First, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying a motion for sen-

> tence modification. If the defendant demonstrates the existence of a new factor, the trial court is then obliged to determine whether the new factor justifies modification. In other words, in order to succeed on a claim for sentence modification based on a new factor, an inmate must prevail in both steps of the new factor analysis by proving the existence of a new factor and that it is one which should cause the trial court to modify the original sentence.

State v. Doe, 2005 WI App 68, ¶ 6, 280 Wis. 2d 731, 697 N.W.2d 101 (citations omitted).

B. Hoerig's New-Factor Claim For Sentence Modification Fails At The First Analytical Step.

Hoerig's new-factor claim fails at the first analytical step: he did not "demonstrate, by clear and convincing evidence, that there is a [fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties] justifying a motion for sentence modification." ***Id.*** (substituting the definition of "new factor" for the phrase).

In his motion, Hoerig asserted that "inaccurate information" in his extended-supervision agent's memo and that "[h]ighly relevant facts which were not considered at the time of sentencing" qualified as "new factors" (31:2, R-Ap. 185). *See also* Hoerig's Amended Brief at 9-10.

For four reasons, this court should reject Hoerig's new-factor claim.

1. Because Hoerig failed to show that all of the parties unknowingly overlooked the purported new factors, this court should reject Hoerig's new-factor claim.

"[*A*]*ll* of the parties" — not just the court — must "unknowingly" overlook the facts or set of facts. *Cf.* ***State v. Crockett***, 2001 WI App 235, ¶ 14, 248 Wis. 2d 120, 635 N.W.2d 673 ("*See Kluck*, 210 Wis. 2d at 7, 563 N.W.2d 468 (holding that a fact in existence at the time of sentencing is 'new' only if 'unknowingly overlooked by *all* of the parties') (emphasis added)."). Here, Hoerig has not demonstrated that anyone unknowingly overlooked anything. In fact, the complaints arrayed in Hoerig's motion concern matters known to him, to his lawyer, to the prosecutor, and to the court precisely because the agent's memo directly addressed those matters.

Now (if not then), Hoerig obviously disagrees with just about everything in the agent's memo. But if anyone — especially the court — overlooked anything because of errors in the memo, Hoerig has only himself to blame. His attorney addressed the court at the reconfinement hearing (41:3-4, R-Ap. 307-08), as did Hoerig (41:4-5, R-Ap. 308-09). The transcript (41, R-Ap. 305-12) does not contain even a hint of disagreement by Hoerig or his attorney with any aspect of the agent's memo, much less the vehement disagreements Hoerig ad-

vanced in his sentence-modification motion and repeats in his appellate brief.[9]

2. Because Hoerig mischaracterized the so-called "inaccurate information" that serves as one predicate for his new-factor claim, and because Hoerig did not dispute the actual information in the extended-supervision agent's court memorandum, Hoerig's "inaccurate information" contention does not set out a valid new-factor claim.

Although Hoerig referred to "inaccurate information" (31:2, R-Ap. 185) as a new factor, he alleged only one factual inaccuracy (as opposed to opinion-based disagreement): "At no time did the defendant have unsupervised contact with minors. . . . Specifically, the defendant never had contact with his grand-niece, except in the presence of her parents and/or grandparents" (31:4, R-Ap. 187). The violation notice, however, stated this information differently:

---

[9] Hoerig's unrelenting assault on the agent and her memo suggests that Hoerig sees himself as a Mary McCarthy-like critic of his Lillian Hellman-like agent. His attack differs little from McCarthy's on Hellman: "Every word she writes is a lie, including 'and' and 'the.'" HUGH RAWSON & MARGARET MINER, THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 342 (2d ed. 2006).

> 5. Between 12/20/04 and 12120/06, in Milwaukee County, Michael Hoerig did have contact with persons under the age of 18 without prior agent approval and/or an adult chaperone approved by the agent. This behavior is in violation of Rules #1 and S02 of the Rules of Community Supervision, which were signed by the aforesaid on 09/07/04.

(31:38, R-Ap. 221.) The agent's court memo repeated this allegation (31:30, R-Ap. 213) — an allegation subsequently accepted as true by DHA at the extended-supervision revocation proceeding (41:6, R-Ap. 310). The agent further noted that Hoerig "admitted to having unsupervised contact with minors, specifically his grand-niece" (31:31, R-Ap. 214).

In effect, in his motion, Hoerig admitted the truth of the agent's assertion. He did not dispute that the supervision rules he signed required either his agent's prior approval for contact with a person under eighteen years of age or contact under the supervision of an adult chaperone approved by the agent. He did not argue that he had obtained prior approval for the contact or that his agent had approved the chaperones he identified. Rather, he brazenly asserted that the rule really meant something else and that he had complied with the "something else." *See* 31:4-5, R-Ap. 187-88.[10]

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[10] In any event, Hoerig's contention contradicts the unqualified admission Hoerig made at the reconfinement hearing when he acknowledged that he had "not follow[ed] [his] rules of supervision" (41:4, R-Ap. 308). Similarly, Hoerig's lawyer did not equivocate about Hoerig's position: "He understands that . . . there's no room for him to make decisions, that the department supervises him and he's to fol-

(footnote continues on next page)

In short, the only inaccuracy occurred in Hoerig's redefinition of the violation, not in information provided in the agent's memo.

3. Because Hoerig withheld the "[h]ighly relevant facts" he now contends the court should have considered at the reconfinement hearing, he cannot prevail on a claim that the withheld facts qualify as new factors.

Hoerig's contention about "[h]ighly relevant facts which were not considered at the time of sentencing" appears to relate to the reconfinement-hearing comment by the prosecutor that "I can't find anything particularly good to say about Mr. Hoerig (41:2-3, R-Ap. 306-07) — a statement Hoerig characterized in his motion as "[t]his reckless and inflammatory accusation" (41:12, R-Ap. 195), even though he did not voice any objection at the reconfinement hearing. Relying on an exhibit accompanying his motion (31:36, R-Ap. 219 (Exhibit E)), Hoerig further contended that the prosecutor's declaration "ignores considerable evidence to the contrary" (31:12, R-Ap. 195). Other than the list of so-called mitigating facts set out in Exhibit E, Hoerig's motion does not appear to identify any "[h]ighly relevant facts" the circuit court did not consider at the reconfinement hearing.

(footnote continues from previous page)

low those rules of supervision, and he understands . . . that his behavior is not acceptable, Judge" (41:3-4, R-Ap. 307-08).

Exhibit E does set out anything that qualifies as a new factor. Even assuming Hoerig's marriage to his victim in flagrant violation of both the circuit court's original no-contact order and DOC's corresponding no-contact rule of supervision somehow operates as a mitigating rather than aggravating factor, all of the factors in Exhibit E lay within Hoerig's knowledge at the time of the reconfinement hearing.[11] Hoerig, not the prosecutor, bore the responsibility for putting those factors in front of the court. As the reconfinement-hearing transcript shows, even when throwing himself on the mercy of the court (41:4-5, R-Ap. 308-09), Hoerig did not apprise the court of any of the factors he now asserts would have affected the court's reconfinement decision. Consequently, the court overlooked the factors because Hoerig withheld the information from the court. Information a defendant withholds from a sentencing or reconfinement court cannot sensibly qualify as a new factor. *Cf.* ***Crockett***, 248 Wis. 2d 120, ¶ 14 ("Although the trial court may have 'unknowingly overlooked' these facts, Crockett does not claim that he was unaware of them as well. Therefore, these facts are not new factors. *See Kluck*, 210 Wis. 2d at 7, 563 N.W.2d 468 (holding that a fact in existence at the time of sentencing is 'new' only if 'unknowingly overlooked by *all* of the parties') (emphasis added).").

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[11] Hoerig does not indicate when he created Exhibit E.

4. The so-called "new factors" did not frustrate the purpose of the original sentence.

"The effect of the 'new factor' must frustrate the purpose of the original sentencing." ***Delaney***, 289 Wis. 2d 714, ¶ 8 (citation omitted).

Here, neither so-called "new factor" identified by Hoerig frustrated the purpose of the original sentence or the reconfinement decision. Under the judgment of conviction and the corresponding rules of supervision imposed by DOC, Hoerig could not have contact with his grandniece without the agent's prior approval or the presence of an agent-approved chaperone or the supervision of the child's parents or guardian. Any "frustration of sentencing purpose" would arise from validating Hoerig's attempted redefinition of this contact restriction to make the no-contact permissible without satisfying any of those conditions, not from nonexistent "inaccurate information" in the agent's court memo.

Likewise, the "[h]ighly relevant facts" identified by Hoerig did not have the effect of frustrating the original sentence or the reconfinement decision. If anything, items 20 through 23 in Exhibit E (31:36, R-Ap. 219), which invoke his unauthorized marriage to the victim (about which both he and the victim lied to his agent), reflect flagrant defiance of the purpose of the original sentence and would have served (had Hoerig presented them at the reconfinement hearing) as aggravating rather than mitigating factors. Any "frustration of sentencing purpose" would arise from validating Hoerig's de-

lusional belief that conduct grossly subversive of the original sentencing decision can somehow become a justification for mitigating a reconfinement decision imposed, in part, as a result of that conduct.[12]

IV. THE NO-CONTACT REQUIREMENT DOES NOT IMPERMISSIBLY INFRINGE HOERIG'S CONSTITUTIONAL RIGHT TO MARRY.

In his motion, Hoerig advanced a conclusory argument that the no-contact restriction unlawfully infringed his fundamental constitutional right to marry (31:3, 14, R-Ap. 186, 197) — in this instance, a constitutional right to marry his victim.[13] He reiterates the contention at various points in his amended appellate brief.

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[12] As shown by DOC's violation notice (31:38, R-Ap. 221) and the agent's court memo (31:29-30, R-Ap. 212-13), Hoerig's unauthorized marriage to his victim served as just one of six violations embracing egregious and continuing conduct flouting the no-contact restriction.

[13] As with the circuit court's misunderstanding that Wis. Stat. § 973.19 did not foreclose Hoerig from seeking sentence modification based on alleged new factor, the court evidently misunderstood that Hoerig's constitutional claim fit within the scope of Wis. Stat. § 974.06(1), under which "a prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." Because Hoerig's claim amounts to a contention that the sentence violates a constitutional right, the circuit court should have decided the claim.

While the State recognizes that the constitution generally protects the right of consenting adults to marry in accord with the law of the jurisdiction in which a marriage occurs, the State rejects — and urges this court to reject — Hoerig's contention that the circuit court's no-contact order and the corresponding rule imposed by DOC amounted to impermissible infringements on that right.

"[P]robation conditions – like prison regulations – are not subject to strict scrutiny analysis." ***State v. Oakley***, 2001 WI 103, ¶ 16 n.23, 245 Wis. 2d 447, 629 N.W.2d 200. "[T]he reasonability standard is the constitutionally valid approach to evaluate a probation condition that infringes upon a fundamental right." ***Id.*** ¶ 19 n.27.

> [G]iven that a convicted felon does not stand in the same position as someone who has not been convicted of a crime, we have previously stated that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976). In *Krebs v. State*, 212 Wis. 2d 127, 130-31, 568 N.W.2d 26 (Ct. App. 1997), the court of appeals recently applied this established standard to uphold a condition of probation that required a defendant who sexually assaulted his own daughter to obtain his probation agent's approval before entering into an intimate or sexual relationship. The court found that although the condition infringed upon a constitutional right, it was reasonable and not overly broad. *Id.* at 131.

Id. ¶ 19 (footnotes omitted). More than thirty-five years ago, the Supreme Court recognized that a rule of supervision can include a requirement that a probationer or parolee (and, now, a person on ex-

tended supervision) obtain permission to do many things, including marry, that people not subject to supervision take for granted:

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. *Typically, also they must seek permission from their parole officers before engaging in specified activities, such as* changing employment or living quarters, *marrying*, acquiring or operating a motor vehicle, *traveling outside the community*, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules — Thirteen Years Later, 15 Crime & Delin. 267, 272-273 (1969).

Morrissey v. Brewer, 408 U.S. 471, 478 (1972) (emphases added).

For four reasons, Hoerig's constitutional challenge lacks merit.

A. Because Hoerig Agreed To The No-Contact Restriction As Part Of The Plea Agreement, Because He Did Not Challenge The Restriction In A Direct-Appeal Process, And Because He Did Not Challenge The Restriction Until After He Deceitfully Violated It, The Doctrines Of Waiver, Forfeiture, And Estoppel Preclude Hoerig From Challenging The Restriction Now.

Hoerig both waived and forfeited his objection to the no-contact restriction,[14] and his conduct estops him from challenging the restriction as well. He entered into a plea agreement that explicitly included an unqualified no-contact restriction as a core feature of the recommended disposition (6:2, R-Ap. 117 ("no contact with victim")). At the sentencing hearing, the prosecutor reiterated the terms of the agreement — including the agreement to the no-contact order — as reflecting the State's request (38:5, R-Ap. 233). Defense counsel did not disagree with the prosecutor's recitation or

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[14] "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***State v. Ndina***, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (quoted source omitted). *See also* ***State v. Jensen***, 2007 WI 26, ¶ 40 n.13, 299 Wis. 2d 267, 727 N.W.2d 518.

with the terms of the plea agreement, including the no-contact restriction. Rather, she told the court that Hoerig "knows what he did is wrong, and he wants to accept responsibility for it. He wants to accept whatever this court gives him . . . ." (38:24-25, R-Ap. 252-53). In his allocution (38:26-30, R-Ap. 254-58), Hoerig did not disagree with or otherwise dispute the prosecutor's recitation or the terms of the plea agreement, including the no-contact restriction. He closed by telling the court that "[y]ou can be assured I will not disappoint you, and I will never have to appear in this Court for any reason whatsoever, for as long as I live" (38:30, R-Ap. 258). After the sentencing, he filed a notice of intent to pursue postconviction relief (14), but he did not file a postconviction motion and did not pursue a direct appeal of his judgment of conviction.

In short, at every point where Hoerig could have timely objected to the no-contact restriction included in his judgment of conviction or to any aspect of the restriction, he did not do so. Rather, he remained silent, eventually challenging the restriction after he had repeatedly violated it, after he had lied about the violations, and after DOC sought revocation based on those violations. Moreover, he affirmatively told the sentencing judge that he understood the scope of the restriction (38:74, R-Ap. 302). Under these circumstances, the court — whether as a matter of waiver, forfeiture, or estoppel — should preclude Hoerig from challenging the no-contact restriction. *Cf.* ***State v. Dziuba***, 148 Wis. 2d 108, 435 N.W.2d 258 (1989) (where defendant entered into plea agreement and did not invoke Wisconsin constitutional and statutory homestead exemptions as an objection to a

restitution condition of probation that potentially required sale of homestead, defendant estopped from subsequently challenging order for sale of homestead to satisfy restitution obligation); *see also* ***id.*** at 115 ("The trial court and the prosecutor relied on the defendant's silence and believed the probation with conditions attached was satisfactory to him."), 116 ("We believe it is unsustainable in principle to now grant the defendant's relief when the defendant failed to object to a condition of probation which infringed on this constitutional right. The defendant should not be permitted to refrain from asserting his constitutional privilege and, after obtaining the benefits of such forfeiture, later claim the privilege . . . ."); ***State v. Gerard***, 57 Wis. 2d 611, 621, 205 N.W.2d 374 (1973) ("The defendant did not object to these terms and conditions of probation at the trial nor at the probation revocation hearing. In fact, defendant expressed his desire for probation on numerous occasions. Not until almost two years later did defendant complain by filing a motion for postconviction relief. Prior to this time he indicated he was willing to comply with its terms, and led the court to so believe.").

B. The No-Contact Restriction Fully Satisfies The Reasonableness Standard For Conditions That Impinge On Fundamental Rights.

"[T]he reasonability standard is the constitutionally valid approach to evaluate a probation condition that infringes upon a fundamental right." ***Oakley***, 245 Wis. 2d 447, ¶ 19 n.27.

At the time Hoerig sexually assaulted the victim,[15] an age gap of thirty-one years separated them (38:5, R-Ap. 233): Hoerig, a man forty-five years old; the victim, a fourteen-year-old girl — in the prosecutor's words, "a huge disparity of age, maturity, and power in this relationship" (38:5, R-Ap. 233).

Hoerig met the victim when Hoerig "was involved in a relationship with this child's mother" (38:5, R-Ap. 233). The prosecutor described the child as "a perpetual runaway from home" during the seven- to eight-month period of the sexual relationship (35:6, R-Ap. 234). During this period, Hoerig "[was] harboring the child, having sex with her, also working with the child to try to get [foster-care] placement of her" with him (38:7-8, R-Ap. 235-36). When the family's social worker rejected the placement, Hoerig "went over her head to the head of the Bureau of Milwaukee Child Welfare and was appealing directly to them, to attempt to get this placement in place. . . . He indicated he wanted to adopt her" (38:8, R-Ap. 236). Hoerig's involvement with the victim and her family "exacerbate[d]" an already difficult situation, "[driving] a wedge between this mother and daughter" (38:8, R-Ap. 236). The prosecutor summarized Hoerig's state of denial:

> He still sees himself as a savior to the child, and doesn't recognize the harm he caused.

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[15] The charged offense occurred on June 2, 2001 (2:1, R-Ap. 113). The criminal complaint, however, asserts that other assaults occurred over several preceding months (2:2, R-Ap. 114).

> He talks in his statement about the offense, about the situation involving the mother, blamed the mother for the situation that [the victim] was in, and put himself in the roll [*sic*] of savior of this child from a bad home situation.

(38:9, R-Ap. 237.) The prosecutor continued:

> He ends on page five by saying there was a lack of parenting received from her mother.
>
> He provided that, and aside from the fact we did something we shouldn't have done, we had something close. . . .
>
> He really doesn't get it. He really doesn't understand why this has had a negative impact on this child and on this family.
>
> It's driven a tremendous wedge between this girl and her mother.
>
> This girl blames her mother for trying to keep her away from the defendant. That has made it very, very difficult for the department to work with this family while the defendant has been in the picture.
>
> The entire time he was out of custody, the child could not be found. . . .
>
> Since the day the court took Mr. Hoerig into custody, this child has been back with her mother, not on the run.

(38:11-12, R-Ap. 239-40.) The prosecutor argued the reasonableness of the State's request "in light of the facts of the matter": "The three years confinement is necessary to punish the defendant, to protect the child, to protect the community, and eight years extended supervision will provide ad-

ditional supervision for the defendant" (38:12, R-Ap. 240.)

The victim's mother told the court that "drastic change[s]" occurred with her daughter when Hoerig entered the picture (38:13, R-Ap. 241). The mother declared that "he has left scars on [the victim], mainly he left scars on my whole family" (38:14, R-Ap. 242). The mother described the impact:

> She's another person I am trying to deal with. She's confused. She is different in the ways of talking, the ways of dressing, make up. Everything. And that's what I'll deal with.
>
> And Michael has taken her to the point she thinks there is nothing in this world that can ever stop her from doing what she is doing, what she wants to do.
>
> I'm just now getting respect back, not much, but slowly respect.
>
> What he has done, and I want you to know, he has destroyed my life and my children's life, and my whole family, and we're the ones that are suffering.

(38:15, R-Ap. 243.)

> She have [*sic*] a lot of psychological problems. There's not one day she don't want to kill herself. There's other days she is confused, totally confused, doesn't even know what it is.
>
> Now she came to me. I don't know what it is to be a teenager. I don't know what it is to do this. I don't know what it is. Everything I wanted to teach her is like baby steps now.

> So I'm begging you and pleading with you, this man is dangerous. . . .

(38:16, R-Ap. 244.)

Responding to the court's questioning, Hoerig attempted to deflect responsibility: "I believe I was manipulated" by the victim (38:53, R-Ap. 281). After a lengthy back-and-forth with Hoerig, the exasperated court told him, "You're so used to trying to come up with the right answer, you just don't want to come up with the honest answer" (38:57, R-Ap. 285).

> I'm listening to your answers and what they tell me, trying to figure out whether or not you are rehabilitatable, and I haven't heard anything yet that tells me that you have any insight into what you did, except that you were subject to Lolitta [*sic*]. That she's just a temptress that you couldn't stop.

(38:61-62, R-Ap. 289-90.) The court added, "You have no insight into the gravity of the offense" (38:63-64, R-Ap. 291-92). *See also* 38:67, R-Ap. 295 ("[Y]ou show no insight. In fact, I think you show so little insight you don't understand what I'm talking about"). The court homed on Hoerig's narcissism: "Your sentencing remarks today were prepared, and they were all about you" (38:66, R-Ap. 295).[16]

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[16] *Cf.* BEACHES (All Girl Prods., Silver Screen Partners IV & Touchstone Pictures 1988) (Bette Midler as the self-absorbed CC Bloom: "But enough about me, let's talk about you. What do you think of me?").

In short, the record shows that the court had ample reason to impose the unqualified no-contact restriction on Hoerig for the duration of his sentence.

C. The No-Contact Restriction Does Not Impermissibly Infringe Hoerig's Constitutional Right To Marry.

Hoerig's no-contact restriction does not differ in any significant way from similar restrictions imposed on other Wisconsin felons and upheld by the courts.

In ***Edwards v. State***, 74 Wis. 2d 79, 246 N.W.2d 109 (1976), the sentencing court imposed a probation condition prohibiting Edwards from "contact[ing] either of her co-defendants." ***Id.*** at 80. Edwards moved to modify the no-contact restriction.

> She stated she and Steven Wilson wanted to be married as soon as possible, and while he was incarcerated they wanted to communicate by mail and visit according to the rules of the state reformatory at Green Bay. The condition was modified so as to allow defendant to correspond with Steven Wilson, otherwise the motion was denied.

Id. at 81. Edwards argued that the restriction infringed her constitutionally and statutorily protected right to marry.[17] The supreme court re-

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[17] Wis. Stat. § 245.02 (1973-74 ed.). In 1979, the legislature renumbered Chapter 245 as Chapter 765. *See* 1979 Wis. Laws ch. 32, § 48; *see also* 1979 Wis. Laws ch. 32,

(footnote continues on next page)

jected her contention, holding that the restriction "was intended to prevent further crime" and "was reasonably related to her rehabilitation and . . . was not overbroad." ***Id.*** at 85.

In ***Williams v. Wisconsin***, 336 F.3d 576 (7th Cir. 2003), "[p]arolee Gregory Williams want[ed] to go to the Philippines to marry a woman with whom he began corresponding while he was incarcerated." ***Id.*** at 578. Section DOC 328.06(8) of the Wisconsin Administrative Code declared that "[a]uthorization to travel to foreign countries shall not be granted to clients." ***Williams***, 336 F.3d at 579. After failing to obtain permission to travel to the Philippines, ***id.*** at 578-79, Williams filed a federal lawsuit "contending that § DOC 328.06(8) unconstitutionally restrict[ed] his rights to travel and marry," ***id.*** at 579. The Seventh Circuit rejected Williams's contention:

> We accept Williams's assertion that he wants to go to the Philippines so that he can marry Dela Rosa, but he too readily assumes that the state's travel restriction (which we have already found to be rationally based) amounts to an absolute prohibition on his right to marry. It is true that *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), recognizes the fundamental right of prisoners to marry – a right that may be limited only for sound penological reasons. But no one here has forbidden Williams from getting married or from marrying Dela Rosa. At most, the state's rule has affected either the timing or the place of his marriage plans. This type of incidental interference with the right to

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(footnote continues from previous page)

§ 92(2) (cross-reference table showing section 245.02 renumbered as section 765.02).

> marry does not give rise to a constitutional claim if there is "some justification" for the interference. . . .

Id. at 582 (citations omitted).

Here, the no-contact restriction burdens Hoerig less than did the restriction in ***Williams***. At most, the restriction incidentally (hence, permissibly) burdened the timing of any marriage plans for Hoerig and his victim. He obviously did not want to wait until he had served his sentence, but his impatience and unwillingness to abide by the terms of the no-contact restriction — a restriction to which he agreed when he pled to his crime — confirms the sentencing court's impression that Hoerig lacked insight into his crime and had an "it's all about me" attitude that raised questions about his ability or willingness to rehabilitate himself. Hoerig's conduct while on extended supervision shows with stunning clarity (as do the content and tone of his second sentence-modification motion and his amended appellate brief) that, as at the time of his original sentencing, he continues to lack insight into his crime and its consequences and that he still has not rehabilitated himself.

D. The No-Contact Restriction Does Not Operate In An Overly Broad Manner.

Contrary to Hoerig's assertion, *see* Hoerig's Amended Brief at 18, the no-contact order does not operate in an overly broad manner. The judgment of conviction has a built-in end date and a criterion for termination: the no-contact restriction ends when Hoerig completes his full sentence, which consists of both the period of initial con-

finement and the period of extended supervision — a total of eleven years. Hoerig clearly dislikes the length of that period, but he consented to that period in his plea agreement, and the court acquiesced in that choice. He does not have any grounds for complaint about a choice he made knowingly, intelligently, and voluntarily.

Moreover, his complaint about the collateral impact of his choice lacks even a semblance of validity. Any sentence adversely affects people other than the defendant, especially family and friends. Those adverse effects, however, flow inevitably as a consequence of the defendant's criminal conduct. Those effects do not provide any basis for excusing Hoerig from serving his sentence under the terms the court imposed and to which he agreed.

V. THE CIRCUIT COURT CORRECTLY REJECTED HOERIG'S OTHER CLAIMS.

In his second sentence-modification motion, Hoerig identified seven errors he regarded as justifying sentence modification (31:13-14, ¶¶ 25-31, R-Ap. 196-97). As the State has already discussed, the circuit court should have analyzed in more detail two of the alleged errors: the "new factor" claim (31:13, ¶ 25, R-Ap. 196), and the constitutional claim regarding the supposed impermissible infringement on Hoerig's right to marry (31:13, ¶ 25, R-Ap. 196). Despite this oversight, the circuit court reached the correct result, and this court should affirm the circuit court's decision denying the sentence-modification motion as it bears on those claims. ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (appellate court may affirm order or judgment on a ground

different from that used by lower court); ***id.*** at 125 ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").

On the remaining claims, the circuit court correctly denied them. Two claims deal, essentially, with Hoerig's disagreement with the agent's court memo, including the ***Plotkin*** analysis and the agent's characterization of him (31:13, ¶ 27, R-Ap. 196; 31:14, ¶ 31, R-Ap. 197). The circuit court correctly noted that Hoerig "could have challenged the contents of the memo at the revocation hearing or in an action for certiorari review" (33, R-Ap. 101).[18] The record does not contain any evidence that Hoerig challenged the memo at the revocation hearing, and he did not file a petition for a writ of certiorari to challenge either the revocation or the agent's memo.

Hoerig attempts to excuse his noncompliance by contending that he saw the memo "for the first time at my hearing in [the] courtroom on 5/14/07 [at the reconfinement hearing]. I never received a copy of this memo until after 7/9/07, pursuant to my persistent prodding of the incompetent attorney I hired" (35, R-Ap. 227). In his amended appellate brief, however, he acknowledges that two months before the reconfinement hearing, "the Administrative Law Judge read from parts of [the agent's memo] at the revocation hearing on

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[18] Review of an extended-supervision revocation occurs exclusively by petition for a writ of certiorari in circuit court. Wis. Stat. § 302.113(9)(g).

3/15/07." Hoerig's Amended Brief at 11. Consequently, Hoerig had at least some knowledge of the memo's contents well before the reconfinement hearing.[19] Moreover, the transcript of the reconfinement hearing shows that Hoerig's lawyer told the court that "I did go over the court memo with Mr. Hoerig *yesterday*" (41:2, R-Ap. 306 (emphasis added)). Neither Hoerig nor his lawyer challenged any aspect of the court memo at the hearing.

If Hoerig had challenged the memo at the reconfinement hearing and lost, he had to pursue that claim on direct appeal from the reconfinement decision. Appellate review of a reconfinement decision occurs according to the procedures established by Wis. Stat. § (Rule) 809.30. ***State v. Swiams***, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400,

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[19] The State seriously doubts that Hoerig had so little knowledge or notice at the revocation hearing. The notice of the revocation hearing provided by DHA to the "client" (*i.e.*, Hoerig) includes "[a] statement that whatever information or evidence is in the possession of the department is available from the department for inspection unless otherwise confidential." Wis. Admin. Code § HA 2.05(1)(e). If Hoerig refrained from seeking inspection of the agent's nonconfidential memo before the revocation hearing, he inflicted his ignorance on himself. Hoerig did not include either the revocation-hearing transcript or the revocation decision in the appellate record. Presumably, if those documents had supported his claim, he would have promptly provided them. *Cf.* ***State v. Benton***, 2001 WI App 81, ¶ 10, 243 Wis. 2d 54, 625 N.W.2d 923 ("when appellate record is incomplete in connection with an issue raised by the appellant, we assume that the missing material supports the trial court's ruling" (citing *Duhame v. Duhame*, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989)).

690 N.W.2d 452. He did not appeal, and the time for appeal from that decision expired long ago.

In short, even according Hoerig the benefit of every procedural doubt, he failed to pursue a timely challenge to the agent's memo at any point from the revocation hearing through the appeal process form the reconfinement decision. The circuit court correctly denied Hoerig's motion in this regard.

Two other claims deal with Hoerig's contentions that the no-contact order "does not serve the objectives of supervision" (31:14, ¶ 30, R-Ap. 197) and that the circuit court should have exercised its discretion in favor of lifting the order (31:13-14, ¶ 28, R-Ap. 196-97). Hoerig presumably presented the same arguments at the hearing on his motion to lift the no-contact order.[20] At that time, the circuit court modified but did not lift the order. The court's decision lay within its discretion. *Cf.* Wis. Stat. § 302.113(7m)(d) (under petition procedure, "appellate court may reverse the [sentencing court's] order only if it determines that the sentencing court erroneously exercised its discretion in granting or denying the petition"). If Hoerig wanted to challenge the circuit court's decision not to lift the no-contact order, he had an obligation to appeal the decision, not seek (in effect) collateral review in a subsequent proceeding under Wis. Stat. § 974.06. Section 974.06 does not embrace challenges to the exercise of discretion. ***Smith v.***

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[20] If he did not, then he has forfeited or waived them by now.

State, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). *See also* ***State v. Varnell***, 153 Wis. 2d 334, 337 n.1, 450 N.W.2d 524 (Ct. App. 1989) ("Generally, when a sentence is within the statutory maximum or otherwise within the statutory power of the court, the question of abuse of discretion in sentencing cannot be raised under sec. 974.06, Stats.").

Hoerig's final claim deals with the alleged disproportion and "gross disparity" between his admitted violations of the no-contact restriction (as well as other rules of supervision) and the reconfinement period imposed by the court ((31:13, ¶ 26, R-Ap. 196). Other than Hoerig's self-pitying laments, the record does not contain any reason to find either disproportion or gross disparity. *Cf., e.g.,* ***State v. Daniels,*** 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) (sentence well within statutory limits "is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances") (footnote omitted).

In his amended appellate brief, Hoerig raises three issues that, by the State's reading, he did not present to the circuit court. *See supra* pp. 16-17 (items 9-11). This court should ignore those claims. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (appellate court will not consider for the first time on appeal any issues not presented in the circuit court). The State will not address those issues unless the court believes the State has misunderstood Hoerig's sentence-modification motion and the court directs the State to address them.

In his motion and his amended appellate brief, Hoerig contended that the circuit court misunderstood DOC's sentencing recommendation. Hoerig's Amended Brief at 24; 31:12, R-Ap. 195. The State regards Hoerig's claim as forfeited because he failed to make a timely objection. In addition, the State regards the claim as inadequately briefed and therefore inappropriate for review. *See, e.g.,* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). If the court disagrees, however, the court should remand the case with instructions that the circuit court address Hoerig's contention.

VI. *STATE EX REL. PLOTKIN* PROVIDES GUIDANCE, BUT NOT THE WAY HOERIG THINKS IT DOES.

In ***State ex rel. Plotkin***, 63 Wis. 2d 535, the supreme court confronted a defendant who also assumed he could disregard a rule of supervision he disliked. In that case, Plotkin pled to five counts of commercial gambling. ***Id.*** at 537.

> As a condition of probation, Plotkin signed an agreement which set forth that he would abide by the usual probation terms in respect to reporting to his probation officer and other routine matters that are included in probation agreements. In addition, at the hearing on which probation was granted, the trial judge specifically added a seventh condition: 'I will not go into The Clock Bar 715 N. 5th St Milwaukee Wisconsin from 11/1/72-8/1/74.' This special provision was separately initialed by Plotkin and was incorporated into the agreement signed by him on August 1, 1972. At the court hearing, the sentencing judge stated that Plotkin was to stay 'completely away from the premises known as the Clock Bar.'

> The reason for this condition is made clear from the sentencing court's record. The record and the subsequent hearing on the revocation show that the Clock Bar had been the scene of the crime. It was the place from which Plotkin admittedly carried on repeated violations of the statutes prohibiting commercial gambling.

Id. at 537-38. Plotkin violated the restriction. At the revocation hearing,

> Plotkin . . . admitted that he had told [probation officer] Jorgensen that he considered it a violation of his rights to be prohibited from going into the bar. He felt that he should be exonerated from the violation because he had not indulged in any illegal activities and that he had been completely honest and open in respect to his admissions to Jorgensen. Plotkin admitted that he had been warned by Jorgensen not to go into the bar, but he said that he did not know that he risked going to jail for the violations and that, had he known, he would have made other arrangements for picking up his mail. He stated that, if his probation was continued, he would obey that condition.

Id. at 539. In affirming Plotkin's revocation, the supreme court wrote:

> This was not a nominal condition that was violated. Rather, the condition was one that went to the heart of the defendant's criminal activities. On oral argument counsel attempted to portray the condition itself as being unreasonable because Plotkin merely went into the bar to pick up his mail. The record reveals, however, the degree to which the presence of Plotkin in this particular bar had been inextricably intertwined with his criminal conduct.
>
> It is also argued that Plotkin was not a man of violence, and that, therefore, he was not a risk to

> others or to society as a whole. The record bears out that Plotkin is probably unlikely physically to assault anyone, but the legislature has seen fit to conclude that gambling of the nature indulged in by Plotkin is a threat to society and to other citizens who may become enmeshed in the toils of the commercial gambler. Plotkin's return to his 'locus operandi' contrary to the conditions of probation constituted a threat to society, to others, and to his own chances of rehabilitation. We do not look upon Plotkin's admission to his probation officer that he was going into the Clock Bar as evidence of openness or cooperation. Rather, it evinces a brazen disregard of the conditions to which he had voluntarily agreed as a portion of his plea bargaining agreement. We give him no plusses for the assertion to the probation officer that he was continuing to go into the bar because he felt the condition was 'unconstitutional' and could not be enforced. He demonstrated a callous disregard for the court's judgment and decided to take the law and its interpretation into his own hands. Had he wished to challenge the condition, it would not have been necessary to defy the admonition of his probation officer, but that is what Plotkin did.

Id. at 546-47.

With a small amount of tweaking, ***State ex rel. Plotkin*** fits Hoerig like a finely tailored bespoke suit, down to the "brazen disregard of the conditions to which he had voluntarily agreed as a portion of his plea bargaining agreement."

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision denying Hoerig's second sentence-modification motion.

Date: July 30, 2009.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8)

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,911 words.

CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

CHRISTOPHER G. WREN